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No. 80-1991

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

THE STATE OF OREGON,

Petitioner,

v.

BRUCE ALAN KENNEDY,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of Oregon

---

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

When the Oregon Court has allowed the double jeopardy bar based upon prosecutorial misconduct and has been sensitive to the Fifth Amendment as incorporated in the Fourteenth Amendment, should the United States Supreme Court monitor the Oregon Court which has measured up to the Oregon and United States Constitutional guidline standards?

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BRIEF FOR RESPONDENT

OPINION BELOW

Petitioner has properly cited the opinion below.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of Oregon, Article I, Bill of Rights, Section 12:

> "No person shall be put in jeopardy twice for the same offense. . ."

United States Constitution, Amendment V:

> "No Person shall ...be subject for the same offense to be twice put in jeopardy of life or limb..."

United States Constitution, Amendment XIV, § 1:

> "...No State shall...deprive any person of life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

The respondent adopts the petitioner's statement of the case as being fairly and accurately stated, with the exception that the

additional information in the court's opinion was to the effect that the court was not bound by the subjective intent of the prosecutor and in the court's opinion (Petition for Certiorari, p. 15):

> "...As such, we think the prosecutor is charged with the knowledge that the comment -- which we must treat as intentional, at least in the sense that it appears it was made deliberately and after some thought -- was certain to interfere with the trial process..."

The court went on, on page 16, to state:

> "...The facts require reversal of the defendant's conviction and his discharge on grounds of former jeopardy."

SUMMARY OF ARGUMENT

1. The facts of this case clearly reveal that the prosecutor intentionally made a highly prejudicial remark that tainted the whole proceedings and that implicit in that intentional statement was bad faith, overreaching and an unfair advantage given to the State and that brings forth all the reasons why the double jeopardy clause was

incorporated both in the State and United States Constitutions.

2. The Oregon Court found on the factual basis that the intentional remark was prosecutorial misconduct and the Oregon Court's findings of fact should not be overturned.

3. The offense in question is against the State of Oregon and should the Oregon Court's opinion be in conflict with any of the federal Circuits' questions in a federal case, that should not be a basis for certiorari as the Oregon Court has lived up to its own Constitutional case law and the Constitutional guidlines set forth in Jorn and Dinitz as upholding the Fourteenth Amendment.

4. The State of Oregon is free to regulate its own procedures and the United States Supreme Court should not correct the State Court in their view of federal Constitutional

questions if they have not offended Fourteenth Amendment guidelines.

5. Even though the Oregon opinion does not refer to its own Constitution, it is obvious that the Court is aware of its own Constitutional basis for double jeopardy and the case law surrounding same. This Court cannot say with certainty that the decision rested solely on federal grounds and not also on state grounds.

6. The Oregon Constitution also provides against double jeopardy and the due process rights of the defendant have been fully protected, and the State has not deprived any due process, but the furthest that this Court should go would be to remand the case to the state Court to clarify the basis of its decision, although it appears obvious that it is sensitive and followed the guidelines of Jorn and Dinitz.

7. The United States Supreme Court should not monitor the Oregon Court on a case by case examination, but only to be certain that the Fourteenth Amendment guidelines have been followed. The Oregon Court has measured up to those guidelines.

Respondent's Argument

The double jeopardy clause is to protect the defendant's right to a single, fair adjudicated trial of his guilt or innocence. United States v. Jenkins, 420 U.S. 358, 370. His right is predicated on a trial that will protect his financial and emotional burden and also reduce the risk that an innocent defendant may be convicted. Arizona v. Washington, 434 U.S. 497, 503-4. Therefore, a defendant has a substantial interest in the decision of whether or not to take a case from the jury. United States v. Jorn, 400 U.S. 470, 485. Jorn also specifies

the exception to the general rule that if defendant's request for mistrial is precipitated by "prosecutorial overreaching," a second trial is barred by the double jeopardy clause. United States v. Dinitz, 424 U.S. 600, 607. "Prosecutorial overreaching" is misconduct intended to "undermine the basic fairness of the first proceeding." United States v. Weaver, 565 F.2d 129, 133 (8th Cir. 1977), United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976). The prosecutor might not have had the specific purpose of provoking defendant's request for a mistrial. United States v. Nelson, 582 F.2d 1246, 1249 (10th Cir. 1978), United States v. Love, 597 F.2d 81, 86 (6th Cir. 1979). This right outweighs the public interest in a second trial.

ANSWER TO PETITIONER'S ARGUMENT

A. Introduction

The general rule is that a mistrial

moved by the defendant removes the barrier for reprosecution. United States v. Jorn, supra. This same case, however, at page 485, states the exceptions, namely that if defendant's motion is prompted by prosecutorial overreaching

The exception to the general rule is just as important as the general rule if the facts warrant it

The facts in this case support the exception:

Comment on Facts

A reading of all the cases cited demonstrates that each case must be decided on its own particular circumstances. Downum v. United States, 372 U.S. 734, 737,

"Each case must turn on its own facts."

Some of the cases talk about negligence, but negligence is not part of this case. The questionable conduct was the act of a professionally trained and experienced deputy district attorney. Her

statements were intentional and her motive ostensibly to obtain an unfair advantage over the defendant.

What her entire motive might have been has to be subjective, but a subjective test cannot be the constitutional test; otherwise the double jeopardy protection would be a mockery.

Therefore, an objective standard has to be applied. What was said? Under what circumstances could such an utterance be anything but highly prejudicial? The answer is, of course, "None." Was such an utterance intentional? Of course it was. We place a heavy burden on bailiffs (State v. Rathbun, 287 Or. 421). Should the burden on a trained lawyer be any less?

Since the unique facts of each case are controlling, let us now look at the record to obtain the real atmosphere of the critical juncture of the trial.

The following points should be considered:

1. The prosecution witness (Ewaldsen) had been doing business with the alleged victim for seven years (JA 15).

2. The prosecution witness had never met the defendant (JA 17, 18, 23, 24).

3. After establishing by her own questions that the prosecution witness did not know, nor had done business with defendant, she then makes the voluntarily and intentionally following statement in the form of a question:

Q. "Have you ever done business with the Kennedys?"

A. "No, I have not."

Q. "Is that because he is a crook?" (JA 24).

The prosecutor had to know that this would abort the trial. No defense counsel could let such a prejudicial statement stand.

5. The Motion for mistrial (JA 24, 25)

6. The court immediately granted the Motion. (The court didn't have to wait -- this indicates that not only the words but the manner, tone and attitude were so detrimental that the decision was quick and decisive).

7. Statement out of line.

Court: "I think it's totally out of line, your question of saying -- it got right to the heart of it. You asked the question. If he had blurted it out without a question on your part, it would be something else possibly." (JA 26)

Court: "...Your question, I feel, Miss Johnson, was highly prejudicial; got right to the heart of it and that it was just uncalled for..." (JA 28)

The Court: "You went one step beyond." (JA 28)

8. Prosecutor argues that the trial should go on and attempts to justify her

detrimental remark. (JA 24,25,26,27,28,29).

9. On retrial the prosecutor is still protesting that her question was proper. (JA 40,21,42). This question was asked when she knew the witness had not done business with defendant. This makes it doubly abhorent.

10. Prosecutor admits the "question - remark" was intentional (JA 44).

11. The questions that need be answered:

(a) Was the remark intentional?

A. Yes.

(b) Was it improper?

A. Yes.

(c) Was it overreaching?

A. Yes.

(d) Was it bad faith?

A. Yes.

(e) Was it obvious that such a remark would lead to a mistrial?

A. Yes.

(f) Should the test be subjective or objective?

A. The latter.

(g) Should the defendant be tried over again in the face of these facts?

A. No.

The petitioner's brief attempts to make an analytical scrutiny and breakdown of a prosecutor's state of mind. They would have the prosecutor's "specific intent" become a subjective test regardless of the outward and objective overreaching statement that forced the defendant into a mistrial. A subjective test would make it impossible to pronounce a rule of law that would give a trial judge a standard to go by without subjecting the Constitutional guarantee to a case by case monitoring by this Court. It would transfer the standard from the objective Constitutional standard to the particular feeling of the trial judge.

The petitioner's suggestion would truly dilute this precious guarantee against double jeopardy.

Petitioner would summarily place this case in the same category where accidental or unforeseen prosecution error results in a mistrial at defendant's request. Many examples are in the cases where such errors occur because of a witness's remarks or the prosecutor's sincere, but overzealousness in closing argument, but this case does not fall in that category.

The prosecutor had "the specific intent" to make the remark that she did.

The consequences also were apparent to her. Can the defendant under these circumstances be told that the prosecutor didn't intend to cause a mistrial? Under what circumstances could a defense counsel not move for a mistrial under these harsh set of facts? The mistrial was a necessity.

The prosecutor's remark was bad faith, and bad faith is the underlying element of overreaching.

The result of the "overreaching" remark without the protection of the double jeopardy guarantee leaves the defendant in a precarious position. They are:

1. Continued exposures to embarrassment.
2. Anxiety.
3. Expense.
4. Restrictions on his liberty, and
5. His valued right to have his first trial completed by a particular jury.

United States v. Dinitz, 424 U.S. 600, 611.

Society's interest, while extremely important, has a constitutional limit and the double jeopardy protection is warranted by the harsh facts of this case.

B. Judicial Application of Double Jeopardy Protection in The Context of Mistrials Caused by Prosecutorial Misconduct.

1. United States Supreme Court Cases

Counsel for respondent does not argue with the petitioner's analyses of the various court decisions. Respondent does disagree with the conclusions of law as they apply to this case. The cases of negligence, oversight, simple error are all understandable, but the facts of this case fall squarely in the language of United States v. Dinitz, supra, at 611:

> "It bars retrials where 'bad faith conduct by judge or prosecutor' ...threatens the '[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant."
>
> Downum v. United States, 372 U.S. 734, 737.

"Each case must turn on its own facts."

The cases of this court are clear that if "bad faith" or "overreaching" by the prosecution are such that a mistrial necessarily results, then all the reasons are present to uphold the double jeopardy protection.

2. Majority Position -- Lower Courts

Each case is dependent on the particular facts. The Oregon Court found the facts to be constitutionally objectionable (Pet. for Cert. 16): "...The facts require reversal..."

The Oregon decision does follow the majority rule. The Court in its opinion (Pet. for Cert. 15) states:

> "...As such, we think the prosecutor is charged with the knowledge that the comment--which we must treat as intentional, at least in the sense that it appears it was made deliberately and after some thought--was certain to interfere with the trial process..."

Respondent would agree that the prosecutor's conduct must appear that there was a "purposeful misconduct calculated to force a mistrial."

It would be difficult to find a more blatant and damaging remark by a prosecutor. For the prosecutor to say she did not intend a mistrial taxes even the credulity of a passerby of our system.

In a criminal slander case, could a defendant excuse himself by saying, "I didn't intend the consequences?"

Prosecutors are trained in the law and an objective standard can be the only valid criteria. The trial judge immediately saw the seriousness of the prosecutor's remark.

3. The Fifth Circuit Minority Position

Analyzing gross negligence cases is going out on a tangent. The Oregon Court of Appeals' opinion is based on the "flagrant overreaching" of the prosecutor. Gross negligence is not part of the decision that is being challenged.

It is interesting to note in petitioner's brief, pp. 30, 31,32, it is argued that a "gross negligence" standard is unrealistic and states, p. 31, "Yet the effect upon the defendant is the same in either case..." (Whether the negligence is by a seasoned or green prosecutor). That same argument can be

made as to the prosecutor's "intent". "The effect upon the defendant is the same."

4. Proposed Rule

The State Court rule is not to be upset because of conflicts among the circuits in federal cases.

Petitioner's "proposed rule" would substantially water down Dinitz and Jorn. No one is attempting to punish the prosecutor. He has a standard to measure up to. The Fourth Amendment cases place a tough standard on the police officer on the front line. Surely the courtroom has more time for reflection than the split second decisions of a police officer on the line.

If the petitioner can excuse the prosecutor in this case, the double jeopardy protection will be set back many years.

C. The Oregon Position

1. Decisional Law

In State v. Jackson, 33 Or. App. 139, the

Oregon Court was confronted with a double jeopardy plea based on conduct of prosecution witness. The court that time did not find bad faith or overreaching or intentional misconduct and the former jeopardy question was fairly resolved. The facts of the case at bar are blatantly more serious than Jackson, and granting the plea was in accord with Jorn and Dinitz.

The petitioner attempts to argue that the Oregon Supreme Court went astray in State v. Rathbun, 287 Or. 421, 600 P.2d 329 (1979) (Misconduct by Bailiff). Not so. The Oregon Supreme Court based its decision on both the Oregon and Federal cases in the case at bar.

The State appears to be very calloused as to the rights of a defendant. The bailiff is part of the court staff and the court found his misconduct "so abhorent to the sense of justice..." The court was applying the constitutional principles laid down in Jorn and

Dinitz.

The petitioner appears to be hung up on the word "intent" and attempts to make a fine distinction between "intent" and "bad faith" or "overreaching".

Three courts in Oregon were of the opinion that the conduct was flagrant to the point that the trial could not continue.

The trial judge said "I think it is totally out of line..." (JA 26) "You went one step beyond." (JA 28)

The Oregon Court of Appeals said "However this case of flagrant overreaching lies outside the general rule. The facts require reversal..." (Pet. for Cert. 15, 16).

The Oregon Supreme Court denied Petition for Review. (Pet. for Cert. 17).

The petitioner, in its brief (p. 31), cites the case of Bell v. State, 286 Md. 193, 204-5:

> "The keystone of the test formulated and consistently followed by the Supreme Court is the requirement of 'intent.' And intent is implicit in 'bad-faith.'..."

To make a hairline distinction between specific intent, bad faith or overreaching would only frustrate the rule. The State selects a trained and experienced prosecutor to prosecute the case. Can the State honestly say she did not intend to say the crucial remarks? She states she talked to the witness out in the hall and had time to reflect before she came back into the courtroom. (JA 42) The petitioner can hardly say it was a "good faith" remark or a harmless remark; it was a flagrantly bad faith remark. If it was bad faith, it was overreaching and squarely within the rule of Jorn, et al.

The petitioner also jumps on the court's language in Kennedy -- "...was certain to interfere with the trial process." It is

clear from the court's opinion that the interference was bad faith conduct and particularly "overreaching." The Kennedy court was correctly following Jorn.

It is interesting to note that the petitioner scantly discusses the parallel double jeopardy provision of the Oregon Constitution, Article I, Section 12. It is true that the opinion discusses the United States Constitution as interpreted in Jorn and Dinitz. The important point is that the Oregon Constitution is not in conflict with the United States Constitution.

The fact that the Oregon Court of Appeals judge does not refer to the Oregon Constitution in no way indicates that he was not aware of such constitutional provision. The Court of Appeals judge realizes he has to satisfy the Fourteenth Amendment standard as guided by the cases.

2. Application of Law to These Facts

The petitioner's brief, p. 43, states, "The question which gave rise to defendant's motion for mistrial was clearly not asked with the intent to provoke a mistrial..."

The real question based on Jorn is "Was it motivated by bad faith or undertaken to harass or prejudice the defendant." The prosecution's remark falls squarely within that criteria.

The petitioner talks about coming in the "back door." (Petitioner's Brief p. 45), "evidentiary practices" and "rehabilitation of witnesses." No trial procedure can rise to the magnitude of a constitutional guarantee. It is the prosecution that is trying to come in the wrong door.

No rationalization can justify or excuse the flagrant overreaching of the prosecutor's remark. It tainted the whole trial and forced the defendant to abort the trial.

ANSWER TO AMICUS CURIAE BRIEF
OF UNITED STATES

RETRIAL ALLOWED UNLESS MISTRIAL PROVOKED

A. The Decision Below is Not Contrary to Consistent Line of Decisions of This Court.

The Solicitor General in his brief would like to persuade this Court that the Oregon Court departed from the rules laid down in Jorn, Dinitz, et al.

Those are landmark cases that set down rules that balance the Constitutional guarantee against double jeopardy and societal interest that guilty parties are convicted.

A review of the cases is commendable, but the Solicitor's analysis fails to emphasize the seriousness of the overreaching that occurred in this case.

Also, it should be remembered that this is a State case and the Oregon Constitution is also involved, Article I, Section 12. This Court's responsibility is to monitor the

Oregon Court to determine whether the Fourteenth Amendment has been violated. If the Oregon Constitution is more sensitive, then that should not be a concern of the Federal Court. This Court's concern is that the Oregon Courts respond to the Fourteenth Amendment standard and not fall short. That has been accomplished.

The Fourteenth Amendment prohibition does not prevent the State from interpreting its own Constitution as long as the Fourteenth Amendment standard is protected.

In our system of dual sovereignty, the responsibility of this Court is not to reverse or modify a result that has been adequately resolved by the State Court.

The Fifth Amendment prohibits the nation from depriving, and the Fourteenth Amendment is a ban on the States. Oregon has protected, not offended, the defendant-respondent's Fourteenth Amendment rights.

STATE STANDARDS RESPECTED

Complete uniformity through the fifty States and the Federal Circuits is an impossibility. Has Oregon measured up to the basic standard is the real question -- not whether it went beyond what the Attorney General of Oregon and the Solicitor General might think the rule should be.

Carter v. Illinois, 329 U.S. 173, at 175:

> "But the Due Process Clause has never been perverted so as to force upon the forty-eight States a uniform code of criminal procedure. Except for the limited scope of the federal criminal code, the prosecution of crime is a matter for the individual States. The Constitution commands the States to assure fair judgment. Procedural details for securing fairness it leaves to the States. It is for them, therefore, to choose the methods and practices by which crime is brought to book, so long as they observe those ultimate dignities of man which the United States Constitution assures... Wide discretion must be left to the States for the manner of adjudicating a claim that a conviction is unconstitutional. States are free to devise their own systems of review in criminal cases...."

Page 176:

> "...So long as the rights under the United States Constitution may be pursued, it is for a State and not for this Court to define the mode by which they may be vindicated."

The theory of dual sovereignty constitutionally grants definite powers to the States. The Fourteenth Amendment superimposes a duty upon the States. Carter v. Illinois, supra, page 176:

> "...For the relation of the United States and the courts of the United States to the States and the courts of the States is a very delicate matter..."

Bute v. Illinois, 333 U.S. 640, at 652-653 (1947), sets forth the Federal government-State government relationship, on page 653:

> "Because the Constitution of the United States, during nearly 80 formative years, thus permitted each state to establish, maintain and accustom its people to that state's own form of 'due process of law,' a substantial presumption arises in favor of, rather than against, the lawfulness of those procedures and in favor of their right

> to continued recognition by the Federal Government as 'due process of law.'..."

Oregon has not fallen below the standard that needs correction. The only issue is whether the action by the State Court violated the Fourteenth Amendment. Oregon measured up.

Bute v. Illinois, supra, page 659:

> "It is natural for state procedures to differ from each other in many ways. It is permissible for the states to establish ways of safeguarding the respective interests of the prosecution and of the accused in their courts..."

Brown v. Mississippi, 297 U.S. 278, at 285:

> "The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'..."

The sound policy behind the rule that State's decision should be respected was well brought out in Herb v. Pitcairn, 324 U.S. 117, 125-126:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power betweeen the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of federal laws, our review could amount to nothing more than an advisory opinion." Id., at 125-126 (citations omitted.).

See also dissenting opinion of Justice Marshall in Oregon v. Hass, 420 U.S. 714, at 726:

> "In my view, we have too often rushed to correct state courts in their view of federal constitutional questions without sufficiently considering the risk that we will be drawn into rendering a purely advisory opinion..."

and also Justice Brennan, in Michigan v. Mosley, 423 U.S. 96, at p. 120:

> "In light of today's erosion of Miranda standards as a matter of federal constitutional law, it is appropriate to observe that no state is precluded by the decisions from adhering to higher standards under state laws. Each state has power to impose higher standards governing police practices under State law than is required by Federal Constitution."

See also State of Oregon v. Flores, 280 Or. 273, at 279:

> "Although we are bound by the United States Supreme Court's interpretation of the Federal Constitution, we are at liberty to adopt a stricter test under our own constitution." Citing Oregon v. Hass, supra.

THE FOURTEENTH AMENDMENT IN HISTORY

Through the years there has been a continuous conflict among the various justices as to the proposition that the Fourteenth Amendment embodied the Bill of Rights.

In Palko v. Connecticut, 302 U.S. 319 (1937), the Court held that the Fourteenth Amendment did not indulge the protection of the Fifth Amendment against double jeopardy.

Palko, however, was expressly overruled in 1969, Benton v. Maryland, 395 U.S. 784, and the prohibition against double jeopardy was finally incorporated as part of due process. However, this has been a "selective incorporation" by some decisions, but the whole process of "incorporating" was upsetting to Justice Felix Frankfurter and he much preferred the "absorption theory." His test was that the judge or prosecutor must have done something that "shocks the conscience." Rochin v. California, 342 U.S. 165, at 172 (1952).

The end result of the historical development of the Fourteenth Amendment is that the States must measure up to a standard. The Constitutional provision is that "No State can deprive a person of...due process." The State of Oregon has not.

The purpose of the Fourteenth Amendment was not to superimpose the federal Court system upon the States. The admonition and

role of the United States Supreme Court is to monitor the State Courts and to determine whether they have measured up to an accepted standard. The Fourteenth Amendment did not intend the United States Supreme Court to override State Courts where the State decision was "properly rooted in the traditions and conscience of our people as to be ranked as fundamental." Duncan v. Louisiana, 391 U.S. 145. If the Oregon Court is oversensitive, that is no Fourteenth Amendment violation.

ANSWER TO "INTEREST OF UNITED STATES"

The Solicitor General is attempting to use an Oregon decision as a basis for reconciling federal cases in the various Circuits that are in conflict. If this were an offense against the United States, his point would be well taken.

A State case that has not offended the Fourteenth Amendment is not the basis for the United States Supreme Court to straighten

out the rule that might be in conflict in the various Circuits. This is a matter of federal concern and the respondent should not be forced to substantial expense, worry and delay where his case has been carefully decided by the Oregon Court of Appeals, and the Oregon Supreme Court has studiously denied a Petition for Review.

ADDITIONAL CASES

Respondent has already stated that each case has to be decided on its own merits. The United States Supreme Court cannot minutely set a standard that trial and appellate judges in fifty states can adequately apply. The basic constitutional guidelines set forth in Jorn and Dinitz safely protect the individual as contemplated by the Fourteenth Amendment and afford a reasonable yardstick. If that yardstick is not used, then there is a federal question. If the yardstick is used to its full measure, then there is no need

for federal intervention.

See:

United States v. Rich, 589 F.2d 1025, (C.A. 10, 1978)

United States v. Martin, 561 F.2d 135, (C.A. Ark. 1977)

United States v. Wilson, 534 F.2d 76, (C.A. Ky. 1976)

Rochin v. California, 342 U.S. 165, at 168:

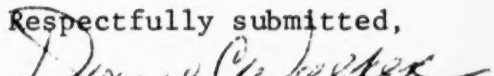
> "Due process of law, 'itself a historical product,'...is not to be turned into a destructive dogma against the States in the administration of their systems of criminal justice."

CONCLUSION

The decision of the Oregon Court should not be disturbed. It has thoughtfully measured up to the standard of due process, both as to the United States and Oregon Constitutions.

The Oregon Court should be affirmed.

Respectfully submitted,



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January, 1982